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No. 79-1236

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

FRANK L. CARSON, LAWRENCE HATCHER, STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL; TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for Fourth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council (EEAC), with the written consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Petitioners.[1]

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[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.* and 42 U.S.C. § 1981). As such, EEAC's members have a direct interest in the issue presented for the Court's consideration; that is, whether the court of appeals erred in holding that the petitioners were not entitled, under 28 U.S.C. §§ 1291 and 1292(a)(1), to appeal the denial by the district court of a joint motion by the parties to approve and enter a proposed consent decree settling claims of employment discrimination under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.[2]

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[2] Because of its interest in issues involving the Court's interpretation of Title VII, EEAC has filed amicus curiae briefs in other equal employment cases. See e.g., *Gardner* v. *Westinghouse Broadcasting Company*, 437 U.S. 478 (1978); *Great*

STATEMENT OF THE CASE

Petitioners representing a class of black present and former employees and applicants for employment of a subsidiary of the respondent American Brands, Inc., brought this suit on October 24, 1975, alleging discrimination in hiring, promotion and transfer in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* After extensive discovery, the parties reached an agreement settling outstanding claims between them and jointly moved the district court to approve a proposed consent decree which would have ordered American Brands and the union to take affirmative action with respect to the hiring and promotion of black employees. Among other things, the company and the union would have been directed to set as a goal for one of its departments the filling of one-third of all supervisory positions with qualified blacks within a specified time period. The decree stated that the employer and union denied having engaged in discriminatory conduct and that the court found from the evidence previously filed that there were no discriminatory hiring practices at the facility in question. In a memorandum opinion and order, the district court refused to enter the proposed decree on the ground that it illegally granted racial preferences to black employees as there was no showing of past discrimination by the employer.

On September 14, 1979, the court of appeals sitting *en banc* dismissed for lack of jurisdiction the appeal of the district court's order. It held that the district

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American Federal Savings & Loan Association v. *Novotny*, 99 S. Ct. 2345 (1979); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); and *United Air Lines* v. *Evans*, 431 U.S. 553 (1977).

court's order denying the injunctive relief was neither a final decision appealable under 28 U.S.C. § 1291 nor an order refusing an injunction under 28 U.S.C. § 1292(a)(1). Three of the seven judges dissented, concluding that the denial was appealable under the latter statute.

SUMMARY OF ARGUMENT

The district court's order denying entry of the consent decree satisfied the requirements of 28 U.S.C. §§ 1291 and 1292(a)(1), thereby giving the Fourth Circuit jurisdiction to consider whether the legal grounds relied upon by the trial court to reject the terms of the proposed settlement were valid. Section 1292(a)(1) provides appellate review as a matter of right for interlocutory orders refusing injunctions. Accordingly, whether the district court's order was appealable under Section 1292(a)(1) initially turns on whether the denial of the consent decree constituted the refusal of an injunction. Because the proposed decree contained directives mandating substantial changes in the defendants' hiring and promotion practices, that question must be answered in the affirmative.

Also, in a series of decisions this Court has delineated the scope of appellate jurisdiction authorized by Section 1292(a)(1). These opinions make clear that such jurisdiction will not be denied interlocutory orders of district courts which pass on the legal sufficiency of the appellant's claim for relief or for which effective review would be precluded if the appeal were delayed until the conclusion of the trial. Here, the district court clearly denied the requested relief on the ground that it could not lawfully be granted. Second, it is highly unlikely that a post-

trial ruling on a pre-trial settlement issue would provide meaningful review. After trial, the pretrial settlement issues would no longer be viable, as the question of liability would have been resolved at trial and the appropriate remedy would be directly related to the violation *found*, if any. Also, the parties would have little incentive at the end of a trial conclusively establishing liability to seek judicial permission to reenter an agreement reached through disclaimers of liability. As a result, the opportunity to resolve the issues *before* trial would have been lost and the policy of Title VII favoring voluntary compliance would have been undercut.

Appellate jurisdiction is also available as a matter of right under the collateral order doctrine recognized by this Court in *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949). That doctrine sets aside the finality requirement for interlocutory rulings of the kind from which the instant appeal was taken—i.e., those that conclusively determine a disputed question completely divorced from the merits of the action.

Finally, Congress has selected settlements to be the primary means of enforcing Title VII. Obviously, there is greater incentive to undertake serious settlement negotiations and to seek creative solutions to the issues posed if the parties can be reasonably certain that any question concerning the validity of settlement terms that they negotiate can be resolved quickly. If, however, district courts are to be given a *carte blanche* to circumscribe narrowly the legal grounds for settlement and effective review of such rulings is to be withheld until after trial, that result would have a debilitating effect on the process by which employment discrimination claims are settled.

ARGUMENT

THE ORDER REFUSING ENTRY OF THE CONSENT DECREE AS UNLAWFUL IS APPEALABLE AS A MATTER OF RIGHT UNDER 28 U.S.C. §§ 1291 AND 1292(a)(1)

A. The District Court's Refusal to Enter The Consent Decree Is Appealable Under 28 U.S.C. 1292(a)(1) As An Order Denying An Injunction

Although 28 U.S.C. § 1291 generally limits appellate review of district court orders to final decisions, exceptions are available for certain interlocutory orders which have final and irreparable effect on the rights of the parties. 28 U.S.C. § 1292; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The question before the Court is whether the district court's order refusing entry of a consent decree resolving the employment discrimination claims alleged by the plaintiffs falls within any such exceptions.[3] As now discussed, the decision below is con-

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[3] In answering this question, we urge the Court to consider the implications of its decision upon the enforcement of Title VII. The holding of the Fourth Circuit majority denying the right to appeal the district court's refusal to approve the parties' settlement undercuts Congress' decision that cooperation and voluntary compliance with the civil rights laws are "*the preferred* means for achieving [the elimination of unlawful employment discrimination]. . . ." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1975) (emphasis in the original). See also *United Steelworkers* v. *Weber*, 99 S. Ct. 2721, 2728 (1979); *Oscar Mayer & Co.* v. *Evans*, 99 S. Ct. 2066, 2071 (1979); and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-18 (1975). To comply with this Congressional mandate, "there is great emphasis in Title VII on private settlement and the elimination of unfair practices without

trary to the statutes governing appellate review and to the purposes of Title VII and other civil rights statutes.

Section 1292(a)(1) provides that:

> The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, *refusing* or dissolving *injunctions*, or refusing to dissolve or modify injunctions . . . . (emphasis supplied).

Appealability, therefore, initially turns on whether the district court's refusal to enter the relief requested "was the refusal of an 'injunction' under § 1292." *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 180 (1955).

An injunction has been defined as a judicial command that a party act in certain instances and/or not act in others, *Lewis* v. *Tobacco Workers' International Union*, 577 F.2d 1135, 1139 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979), and an interlocutory order denying an injunction has been described as an order temporarily refusing to award part or all of the permanent injunctive relief sought by the claimant. 9 Moore's Federal Practice ¶ 110.19 (2d Ed.). It is indisputable, therefore, that the denial of the decree in this case was a denial of injunctive relief. Styled "Injunctive Relief for the Class," the proposed settlement would have directed changes in seniority and benefit systems, established hiring goals for qualified blacks in certain supervisory positions, granted job bidding preferences for sea-

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litigation." *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968) (emphasis added). See the discussion below (pp. 11-16).

sonal employees and prohibited discrimination against black employees. Indeed, even the court of appeals considered the relief requested to be injunctive. As the court stated, "Here, injunctive relief was not finally denied; it was merely not granted at this stage of the proceedings." *Carson* v. *American Brands, Inc.*, 606 F.2d 420, 423 (4th Cir. 1979).

Unlike the court below, other appellate courts have agreed on the correctness of reviewing interlocutory orders respecting injunctive relief which have been entered during the course of employment discrimination litigation. For example, in *United States* v. *Alexandria*, 22 FEP Cases 872 (5th Cir. 1980), the court, in reviewing the trial judge's refusal to enter a consent decree agreed to by the litigants, brushed off the jurisdictional challenge by relying on its earlier decision in *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, 847 (5th Cir. 1977).[4] Applying the *Myers* rationale to the refusal of a consent decree, the Fifth Circuit concluded:

> Since an order granting approval of a consent decree is one 'granting' an injunction for purposes of § 1292(a)(1), an order refusing approval of a consent decree is necessarily one "refusing" an injunction for purposes of § 1292 (a)(1), and is therefore appealable. 22 FEP Cases at 874, n. 5.[5]

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[4] In *Myers* the court asserted jurisdiction to review the approval of a settlement containing injunctive provisions effecting changes in a collective bargaining agreement.

[5] See also *EEOC* v. *International Longshoremen's Association*, 511 F.2d 276 (5th Cir. 1975), in which appellate jurisdiction was taken over the trial judge's denial of a request for a permanent injunction merging segregated longshoremen's unions.

Similarly, in *Lewis* v. *Tobacco Workers International Union*, 577 F.2d 1135, as in *Myers*, the Fourth Circuit took jurisdiction over an appeal of an interlocutory order adopting guidelines for injunctive relief proposed by the plaintiffs in a Title VII case on the basis that the order was the grant of an injunction under Section 1292(a)(1).

Also, this Court in a series of decisions has delineated the scope of appellate jurisdiction authorized by Section 1292(a)(1). These decisions make clear that jurisdiction is available as a matter of right under Section 1292(a)(1) if the order in question affects the merits or passes on the legal sufficiency of the appellant's claims for injunctive relief, or effective review would be precluded if the appeal were delayed until the conclusion of the trial. They also leave open the possibility of an appeal in cases where more than triable issues of fact are involved. Conversely, appellate jurisdiction is not granted to interlocutory orders which merely control procedural aspects of the litigation, may be effectively reviewed after the trial court has entered final judgment, or do not pass on the legal sufficiency of such a claim.

For example, in *Switzerland Cheese Association* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966), a Section 1292(a)(1) appeal was not permitted from the denial of a motion for summary judgment requesting a permanent injunction because the denial was "strictly a pretrial order that decides only one thing—that the case should go to trial." But the Court in *Switzerland Cheese* "left open the question whether an order denying summary judgment might be appealable as an order denying an injunction when the ground for the denial was other than the exist-

ence of a triable issue of fact." *Goldstein* v. *Cox*, 396 U.S. 471, 475 n. 2 (1970) (emphasis added).[6] Moreover, the Court in *Switzerland Cheese* found that the denial of summary judgment did not deny any relief, as the order did "not settle or even tentatively decide anything about the merits of the claim." 385 U.S. at 25. Similarly, in *Baltimore Contractors* a refusal to stay an action for an accounting pending arbitration was not seen as an interlocutory order denying injunctive relief, but was held to be merely "a step in controlling the litigation before the trial court . . . ." 348 U.S. at 185.[7] *Gardner* v. *Westinghouse Broadcasting Company*, 98 S. Ct. 2451 (1978), which represents this Court's most recent statement of the requisite elements of a 1292(a)(1) appeal, refused appellate jurisdiction over a challenge to a

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[6] In *Goldstein* v. *Cox* (cited in preceding text), the Court narrowed its ruling in *Switzerland Cheese* to make clear that appeals from summary judgment denials would be prohibited only in cases in which the denial is based upon the existence of a triable issue of fact. The grounds for denial in the instant case do not concern the existence of a fact question. They deal with the legality of a consent decree mandating preferential treatment in the employment and promotion of blacks absent a finding of discrimination. See also *EEOC* v. *International Longshoremen's Association*, 511 F.2d 273 (5th Cir. 1975), at note 5, *supra*, which permitted appellate review of a denial of a permanent injunction because, *inter alia*, the appeal dealt with a matter of law.

[7] A grant of partial summary judgment in Title VII litigation was also considered nonappealable in *Liberty Mutual Insurance Company* v. *Wetzel*, 424 U.S. 737, 744-45 (1976), as the appeal was made before an actual injunction had been formulated. Because the order appealed in *Liberty Mutual* failed to either grant or deny injunctive relief, the Court did not rule on its appealability under Section 1292(a)(1).

pretrial order denying class certification in a Title VII case. The court noted that the order could be reviewed both prior to and after final judgment, and it neither affected the merits of the petitioner's claim nor passed on the legal sufficiency of any requests for injunctive relief.

Here, unlike *Gardner*, the trial court's decision denying pre-trial review of the order clearly turned upon the legal sufficiency of the proposed decree. The trial court cited with approval the statement in *Myers* v. *Gilman Paper Corp.*, 544 F.2d at 854, that "before a court can grant any relief it must find that the defendants engaged in the unlawful employment practices alleged in the complaint." 446 F. Supp. at 788. The court also found that the exculpatory clause as to the defendants' liability coupled with the plaintiff's admission that the employer's hiring practices were lawful "does not create any factual basis upon which relief may be granted." 445 F. Supp. at 789. It further found that the relief requested could not be granted because it would not apply or be limited to persons found to have been victims of racial discrimination. *Id.* Thus, the first requirement for appealability under *Gardner* is clearly satisfied here.

Moreover, delaying the appeal until the conclusion of the trial would preclude any meaningful review of the district court's ruling. The effect of the interlocutory order was to force the parties to go forward with an expensive, time-consuming trial. The court's memorandum plainly demonstrates that a settlement will not be accepted until it is established that the employer and union have committed unlawful employment discrimination. Because the denial negated

the opportunity to resolve this case *without* trial, it was not an order that could reasonably "be reviewed by prior to and after final judgment." *Gardner, supra*, 98 S. Ct. at 2453.

Denying review of such orders until after trial would ignore the fact that settlements are compromises. Here, each side agreed to sacrifice potential legal claims and defenses in order to resolve their dispute.[8] Also, the employer and union, in exchange for a clear statement as to freedom from liability, agreed to make substantial changes in hiring and promotion practices.[9]

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[8] This Court stated in *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971):

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

[9] As the dissent stated below:

> Disclaimers of liability and disclaimers of admissions of legality are not uncommon in settlement agreements, as well as in consent decrees. A ruling that litigation may not be settled unless a party formally admits liability, or formally concedes legality, or a court determines liability or a lack thereof, would defeat the general policy of the law to foster settlements *since the very purpose of a settlement is usually to avoid an adjudication or a concession of rights.* 20 FEP Cases at 1195. (Emphasis supplied).

Once the question of liability has been decided in a judicial proceeding, however, it is highly unlikely that the parties or district court would be willing to return to the terms of the original consent decree. After a trial, any remedy must be tailored to fit the violations (if any) found by the trial court. *Cf.*, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 417 (1977). No party who stands to gain more from a trial decree than the settlement would be willing to accept the originally proposed terms. Moreover, it is doubtful that a district court has the authority after trial to approve a settlement not closely related to the precise violations found. *Brinkman, supra.*

It is difficult, therefore, to conceive how a post-trial ruling by the appellate court on the propriety of the district court's refusal to accept the pre-trial settlement agreement would be a meaningful review of the district court's action. Although the court of appeals below may have been technically correct in saying that the merits of the decree can be reviewed following final judgment, 606 F.2d at 424, such a right of review would be an empty right. Treating the order as unreviewable until the conclusion of the trial means, as a practical matter, that the parties have lost irreparably their right to settle the discrimination claims in a manner negating the need for a trial. Such a loss hardly fulfills the objective of Title VII, which is to encourage, not discourage, settlements.[10]

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[10] Recognition that settlement avoids costly and protracted litigation undoubtedly was a strong reason for Congress' emphasis upon conciliation and voluntary compliance as the primary means of enforcing Title VII. Although permitting

A prohibition against appellate review of orders denying pretrial settlements would also have a debilitating effect on the process by which employment discrimination claims are settled. Obviously, there is greater incentive to undertake serious and often protracted settlement negotiations and to seek creative solutions to the issues posed if the parties can be reasonably certain that any question concerning the validity of settlement terms that they negotiate can be resolved quickly. If, however, district courts are to be given a *carte blanche* to circumscribe narrowly the legal grounds for relief, and effective review of such rulings cannot be obtained until after trial, then:

> [p]arties would be hesitant to explore the likelihood of settlement apprehensive as they would be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise. *Florida Trailer and Equipment Co.* v. *Deal*, 284 F.2d 507, 571 (5th Cir. 1960).

Many of EEAC's members have entered into consent decrees in order to avoid lengthy trials and

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appeals from denials of proposed settlements would increase appellate litigation to some extent, in the aggregate, litigation would be lessened by obviating the need for a lengthy trial and later appellate review of *both* the substantive and remedial aspects of the district court's findings *plus* the validity of the proposed decree. Permitting appeals of such orders, therefore, is consistent with this Court's concern for the effect on the courts' dockets of permitting interlocutory appeals. See *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176, 181-82 (1955); and *Coopers & Lybrand* v. *Livesay*, 98 S. Ct. 2454, 2463 (1977).

protracted litigation. Pursuant to these decrees, thousands of alleged discriminatees have received compensation and other remedies much more quickly than if they had been required to await the end of a lengthy trial and then an appeal of both an earlier denial of a proposed settlement and the trial proceedings. The importance of settlement to the enforcement of Title VII rights was described vividly by Judge Higginbotham in his opinion in *Commonwealth of Pennsylvania* v. *Local Union 542, Int'l Union of Operating Engineers*, No. 71-2698 (E.D. Pa.), order dated November 7, 1979, No. 223, Daily Labor Report, November 16, 1979, pp. D-1 through D-2:

> Tragically, the parties were once again unable to settle the case even though I made specific recommendations on dollar amounts and injunctive relief. One side was willing to accept my recommendation but the other side made, in my view, such an unrealistic demand that the class plaintiffs' cupboard will again be barren—except for the gratification that their counsel will be arguing refined, sophisticated legal doctrines about damages which they hope to collect years from now.
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> * * *
>
> [A]t the damage phase, all counsel must come to grips with the reality that it is often easier to litigate acrimoniously and protractedly than it is to use creative efforts in attempts to constructively terminate litigation. In the final analysis, the brilliant briefs of counsel, the flash of eloquent arguments, the citations in the future to their case as significant precedent, and even the drama of a packed courtroom will never be

adequate mementos for the victims of discrimination who desire money and jobs *now*. Similarly, protracted litigation does not aid the defendants who at this stage must recognize that it is far better to conclude litigation with liability and responsibilities being defined now, than to wallow endlessly in a quagmire of unresolved disputes—as lawyers are kept busy litigating, and operating engineers and their employers are kept confused by the unending process.

The decision below would disrupt the settlement process, increase litigation in complex cases and prolong final determinations of the rights and obligations of all parties in a manner that is directly contrary to the intent of Congress and the purposes of Title VII.

B. The Order Refusing Entry Of The Consent Decree Is Appealable As A Collateral Order Under 28 U.S.C. § 1291.

28 U.S.C. § 1291 [11] provides for appeal "from all final decisions of the district courts," except when direct appeal may be brought to this Court. Appellate courts have been cautioned, however, not to apply the finality requirement of the statute rigidly, but to give it a "practical rather than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974). Accordingly, a decision ap-

[11] The section provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the Disrict Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

pealable under Section 1291 falls into one of two categories. Either it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment . . .," *Catlin* v. *United States*, 324 U.S. 229, 233 (1945), or it is final as to some collateral matter.[12] *Cohen, supra*, 337 U.S. 541, 546. Appealable collateral orders were described in *Cohen* as those which:

> finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. 337 U.S. at 546.

For these reasons, the *Cohen* court held that an order in a shareholder's derivative suit which refused to require the plaintiff to post security for costs as required by state law was directly appealable as a matter collateral to the plaintiff's cause of action. Because it was questionable whether the plaintiffs had the financial resources to post security, appellate review would be determinative as to whether the case could go forward at all. Obviously, if this question had not been reviewed until after the trial, effective review would have been denied. As one commentator has pointed out:

> There are frequent situations in which prompt review is urgent. Reversal of some interlocutory orders will terminate litigation . . ., thereby

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[12] An order is collateral if it "is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 444, 558 (1963).

> eliminating needless proceedings in the lower court. Note, 75 Harv. L. Rev. 351, 352 (1961).

Accordingly, this Court has permitted appellate jurisdiction to be taken over interlocutory orders that are "fundamental to the further conduct of the case." *Gillespie* v. *United States Steel Corporation*, 379 U.S. 148, 153 (1964), quoting *Land* v. *Dollar*, 330 U.S. 731, 734, n.2 (1947). A Jones Act case, *Gillespie* dealt with a district court order striking both portions of the complaint adding claims under state law and all references to recovery for the benefit of relatives of the decedent other than his mother. When the court refused to certify its order for interlocutory appeal under 28 U.S.C. 1292(b), the plaintiff sought and was given appellate review as a matter of right.

> We cannot say that the Court of Appeals chose wrongly under the circumstances. And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided. Moreover, delay of perhaps a number of years in having the brother's and sisters' rights determined might work a great injustice on them, since the claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands. 379 U.S. at 153.

An interlocutory order was also held appealable in *Eisen* v. *Carlisle & Jacquelin*, *supra*, 417 U.S. 156, which involved a class action brought by odd-lot traders against a stock exchange alleging violation of antitrust and securities laws. At issue was whether

the court of appeals "had jurisdiction to review the District Court's orders permitting the suit to proceed as a class action and allocating the cost of notice." *Id.* at 169. Finding the case to be controlled by *Cohen*, the question was answered in the affirmative as the district court's ruling was found to have conclusively rejected claims that involved a collateral matter unrelated to the merits:

> In our view the Court of Appeals . . . had jurisdiction to review fully the District Court's resolution of the class action notice problems in this case, for that court's allocation of 90% of the notice costs to respondents was but one aspect of its effort to construe the requirements of Rule 23(c)(2) in a way that would permit petitioner's suit to proceed as a class action. *Id.* at 172 (footnotes omitted).[13]

The test for determining whether an order comes within the collateral order doctrine was recently restated in *Coopers & Lybrand* v. *Livesay*, 98 S. Ct. 2454 (1978): the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. The *Livesay* court concluded that an order passing on a request for class certification did not fall within the definition of appealable collateral orders. According to the opinion, because the class

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[13] Two years later, appellate review was denied a ruling on the plaintiff's motion for a partial summary judgment as to the defendant's liability in a sex discrimination case. *Liberty Mutual Insurance Company* v. *Wetzel*, 424 U.S. 737, 744 (1976). Because the plaintiff's initial claims for relief had been left unresolved, the requisite element of finality was found to be missing.

determination involved considerations enmeshed in the factual and legal issues comprising the plaintiff's cause of action, the order was subject to revision by the district court and effective review would be available after final judgment. 98 S. Ct. at 2458.

Norman v. *McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971), applied the criteria developed in *Cohen* and its progeny to a determination of whether the disapproval of a proposed settlement is an appealable collateral order. In that case the Court of Appeals for the Ninth Circuit was asked to assert jurisdiction over a trial court order refusing to accept a proposed settlement of a class action charging the directors, officers and managers of a securities fund with violations of the Investment Company Act. Granting jurisdiction, the court concluded that:

> the order disapproving the proposed settlement is a collateral order. The proposed settlement is independent of the merits of the case. It would not merge in final judgment. Disapproval of the settlement is not a step toward final disposition and it is not in any sense an ingredient of the cause of action. In itself, the district judge's order is final on the question of whether the proposed settlement should be given judicial approval. 431 F.2d at 773.[14]

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[14] A different result was reached in *Seigal* v. *Merrick*, 590 F.2d 35 (2d Cir. 1978), which held that the disapproval of a settlement in a stockholder's derivative suit was not appealable as a collateral order under Section 1291. While viewing such a denial as the equivalent of a denial of a summary judgment or the grant of a new trial which have been held nonappealable, the court did acknowledge that the refusal was final in the sense that "that *particular* settlement will never be revived." *Id.* at 38 (emphasis in original).

Applying the above criteria to the instant case, it is clear that jurisdiction should have been granted below. First, the order conclusively determined a disputed question that was competely separate from the merits of the action, i.e., the legal validity of a proposed settlement apart and separate from a trial determination of the merits of plaintiffs' claims. Second, the suit alleged violations of statutes and constitutional prohibitions forbidding employment discrimination. In contrast, the order from which the appeal is sought dealt with the question of whether a district court may grant injunctive relief containing specific employment quotas based on race without a conclusive determination having been made as to the employer's liability. The question on appeal is not one that is likely to arise during the course of a trial on the plaintiff's claims. Finally, the order is effectively unreviewable on appeal from a final judgment. As discussed above, the parties would have little, if any, incentive at the conclusion of a trial in which liability was established to seek judicial permission to reenter an agreement reached through disclaimers of liability.[15]

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[15] See, pp. 11-14, *supra*.

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully submits that the decision of the Court of Appeals for the Fourth Circuit refusing to assert appellate jurisdiction under 28 U.S.C. § 1291 and 1292(a)(1) over a challenge to the district court's order refusing entry of the consent decree should be reversed.

Respectfully submitted,

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